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In The

Supreme Court of the United States

October Term, 1992

RAMSEY S. AGAN,

Petitioner,

vs.

STATE OF GEORGIA,

Respondent.

Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Georgia

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the trial court and reviewing courts err in rejecting Petitioner's claim of selective prosecution?

2. More particularly, in states like Georgia, which uphold over First Amendment challenge jury charges that allow defendants to be convicted under local bribery statutes on the basis of the chronological coincidence between large campaign contributions and lobbying activities alone, without proof of "something more" factors such as a *quid pro quo* arrangement, do local courts err in rejecting subsequent claims of selective prosecution on the basis of a district attorney's invocation of a litany of "something more" factors that allegedly distinguish the subject prosecution and the attendant suggestion that other prosecutions on the basis of chronological coincidence alone would be futile?

3. Likewise, do local courts in that situation err in focusing on the discriminatory intent of the district attorney at the moment of indictment without reference to the objective effect over time, both pre- and post-indictment, of whether the unparalleled bribery prosecution of a defendant was based on a *de facto* arbitrary classification whereby he alone was prosecuted and all other makers of "chronologically-coincident" campaign contributions within the state or local jurisdiction go free?

4. Likewise, do local courts in that situation err in allowing the district attorney to cite the willingness of the local officials sought to be "bribed" to turn state's evidence as a "something more" factor differentiating the subject prosecution from the case of other unprosecuted

QUESTIONS PRESENTED – Continued

makers of "chronologically-coincident" campaign contributions, while refusing to allow the motives of those local officials to be examined and imputed to the district attorney?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL PROVISIONS & STATUTES INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE PETITION 18

CONCLUSION 30

APPENDICES:

Appendix A – Opinion of the Ga. Supreme Ct. (*Agan II*) A-1

Appendix B – Opinion of the Georgia Court of Appeals B-1

Appendix C – Order of Trial Court on Motion to Dismiss for Selective Prosecution C-1

Appendix D – Opinion of the Ga. Supreme Ct. (*Agan I*) D-1

Appendix E – Excerpts/Petitioner's Requests to Charge to the Trial Court E-1

Appendix F – Excerpt/Trial Court's Charge F-1

Appendix G – Motion to Dismiss for Selective Prosecution and Motion for Evidentiary Hearing & Brief in Support G-1

TABLE OF AUTHORITIES

Page

CASES

Federal:

Broadrick v. Oklahoma, 413 U.S. 601, 93 S.Ct. 2908 (1973) 19

Buckley v. Valeo, 424 U.S. 1, 96 S.Ct. 612 (1971) .. 5, 18, 19

Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961) 28, 29

Flagg Brothers, Inc. v. Brooks, 436 U.S. 149 (1978) 29

Grayned v. City of Rockford, 408 U.S. 104 (1972) 4, 6

Kolender v. Lawson, 461 U.S. 352 (1983) 4

Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982) 29

McCormick v. U.S., ___ U.S. ___, 111 S.Ct. 1807 (1991) 6, 10, 11, 16, 21

McFarland v. American Sugar Refining Co., 241 U.S. 79, 36 S.Ct. 498 (1916) 26, 27

Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972) 28

Murray v. Wal-Mart, Inc., 874 F.2d 555 (8th Cir. 1989) 29

Smith v. Allwright, 321 U.S. 649 (1944) 28

Smith v. Goguen, 425 U.S. 506, 94 S.Ct. 1242 (1974) 4

Snowden v. Hughes, 321 U.S. 1, 64 S.Ct. 397 (1943) 26

United States v. Brewster, 506 F.2d 62 (D.C.Cir. 1974) 19

United States v. Dozier, 672 F.2d 531 (5th Cir. 1982) .18, 19

Yick Wo v. Hopkins, 18 U.S. 356, 6 S.Ct. 1064 (1886) 16, 22, 24, 25, 26

TABLE OF AUTHORITIES – Continued

Page

State:

Agan v. State, 191 Ga.App. 92, 380 S.E.2d 757 (1989) 5, 9

Agan v. State, 259 Ga. 541, 384 S.E.2d 863 (1989), *cert. denied*, 110 S.Ct. 1526 (1990) ..... *passim*

City of Baltimore v. Redecke, 49 Md. 217 23

Ingram v. State, 97 Ga.App. 468, 103 S.E.2d 666 (1958) 18

People v. Branstetter, 103 Ill.App.3d 359, 430 N.E.2d 731 (1982), *cert. denied*, 459 U.S. 968, 103 S.Ct. 342 (1982) 5, 19

Slaughter v. State, 99 Ga.App. 239, 108 S.E.2d 161 (1959) 18

State v. Causey, 246 Ga. 735, 737, 273 S.E.2d 6 (1980) 26

STATUTES

O.C.G.A. Section 16-2-2 ..... 3, 4, 10

O.C.G.A. Section 16-10-2 3

O.C.G.A. Section 21-5-3 ..... 3, 6

OTHER AUTHORITIES

Lowenstein, *Political Bribery and the Intermediate Theory of Politics*, 52 U.C.L.A. L. Rev. 784, 809 (1985) 20, 22

TABLE OF AUTHORITIES – Continued

Page

Note, *Campaign Contributions and Federal Bribery Law,* 92 Harv. L. Rev. 451, 453-55 (1978)..... 19

Tribe, *American Constitutional Law,* p. 1028, n. 20 (2d Ed. 1988).....10, 16

The Atlanta Constitution [3/16/91], p.A-12 24

The Atlanta Constitution [6/23/91], p.D-10 23

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Ramsey S. Agan, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Georgia affirming a decision by the Court of Appeals of Georgia, which rejected his challenge to the trial court's ruling that Petitioner had failed to prove selective prosecution.

OPINIONS BELOW

The Opinion of the Supreme Court of Georgia is reported at 262 Ga. 783, 426 S.E.2d 552 (1993) ("Agan II"), and reprinted as Appendix A. The Opinion of the Court of Appeals is reported at 203 Ga.App. 863, 417 S.E.2d 156

(1992), and reprinted as Appendix B. The unreported Order of the trial court on Petitioner's Motion to Dismiss for Selective Prosecution is reprinted as Appendix C. An earlier related decision by the Supreme Court of Georgia, which rejected Petitioner's challenge to the jury charge, yet remanded the case to the trial court for an evidentiary hearing on the issue of selective prosecution, is reported at 259 Ga. 541, 384 S.E.2d 863 (1989), cert. denied, 110 S.Ct. 1526 (1990) ("Agan I"), and reprinted as Appendix D.

JURISDICTION

The judgment of the Supreme Court of Georgia was entered on February 25, 1993. This Court has jurisdiction to review the judgment of the Supreme Court of Georgia by Writ of Certiorari pursuant to 28 U.S.C. Section 1257(a). The Petition is timely under 28 U.S.C. Section 2101(d) and Rules 13.1 and 13.4 of this Court.

CONSTITUTIONAL PROVISIONS & STATUTES INVOLVED

Section One of Amendment XIV to the United States Constitution provides in pertinent part that:

> No state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Amendment I to the United States Constitution provides in pertinent part that:

> Congress shall make no law . . . abridging the freedom of speech . . . ; or the right of the people

> peaceably to assemble, and to petition the Government for a redress of grievances.

Official Code of Georgia annotated Section 16-10-2(a)(1) provides in pertinent part that:

> A person commits the offense of bribery when . . . [h]e gives or offers to give to any person acting for on behalf of the state or any political subdivision thereof . . . any benefit, reward, or consideration to which he is not entitled with the purpose of influencing him in the performance of any act related to the functions of his office.

Official Code of Georgia Annotated Section 21-5-3(6) provides in pertinent part that:

> [A reportable campaign] '[c]ontribution' means a gift, . . . or anything of value . . . transferred for the purpose of influencing the nomination for election or election of any person for office. . . . The term 'contribution' shall include other forms of payment made to candidates for office or who hold office when such fees and compensation made can be reasonably construed as a campaign contribution designed to encourage or influence a candidate or public officer holding elective office.

STATEMENT OF THE CASE

Introduction: *Agan I*

On June 19, 1987, Petitioner Ramsey Agan ("Agan") was indicted on three counts of bribery under O.C.G.A. §16-10-2(a)(1). The charges stemmed from the fact that Agan gave checks clearly denominated as "campaign contributions" and totaling $7,500.00 to two sitting county commissioners, while lobbying them for support

on a zoning matter in which Agan was directly interested. He was subsequently convicted.

In *Agan I* Agan attacked his 1989 conviction under the Georgia Bribery Statute (the "Statute"), O.C.G.A. Section 16-2-2(a)(1), on the basis that the Statute was unconstitutionally vague and overbroad as applied to his case —trenching on his core First Amendment rights to associate, petition or lobby, and make campaign contributions in the political arena.

Specifically, Agan objected to the Statute insofar as it defined the crime of bribery as follows:

> [G]iv[ing] or offer[ing] to any . . . [public official] *any benefit, reward, or consideration to which he is not entitled with the purpose of influencing him* in the performance of any [official] act. . . .

Id. (emphasis added). It was Agan's contention that the Statute was unconstitutional because of the uncertain meaning of the phrases "any benefit, reward, or consideration to which he is not entitled" and "with the purpose of influencing him" as applied to campaign contributions —*and* because of the failure of the Georgia courts to provide juries with any clue on how to distinguish "good" from "bad" influencing contributions.

In particular, he argued that the line between "good" and "bad" influencing campaign contributions under the Bribery Statute, as charged by the trial judge, was unconstitutionally vague under the First Amendment because it gave too much prosecutorial discretion to law enforcement officers, with the attendant dangers of arbitrary and discriminatory enforcement, which is especially intolerable in the area of First Amendment rights. *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972); *Kolender v. Lawson*, 461 U.S. 352, 358 (1983), *quoting Smith v. Goguen*,

415 U.S. 506, 574-75 (1974). *See also Buckley v. Valeo,*, 424 U.S. 1, 41 (1976).

In his own Request to Charge No. 9 (*see* Appendix E, *infra*), Agan proffered to the court an appropriate saving construction of the statute: namely, that otherwise valid campaign contributions can be considered bribes only if made or offered "conditional[ly]" as part of a *quid pro quo* arrangement.

That suggested bright line rule (the "Quid Pro Quo Rule") for use by triers of fact in separating the core of constitutionally proscribable conduct that the Statute clearly prohibits from the "innocent" acts which necessarily fall within the protected breathing space required by critical First Amendment political and associational freedoms was supported by federal Hobbs Act cases and other state cases like *People v. Brandstetter,* 103 Ill.App.3d 259, 430 N.E.2d 731, 735 (1982), *cert. denied,* 459 U.S. 988 (1982).

In essence, the Georgia Court of Appeals agreed. *Agan v. State,* 191 Ga.App. 92, 380 S.E.2d 757 (1989). It held Agan had a constitutional right to be convicted, based on a charge that precluded his conviction on the simple basis that he made large chronologically-coincident campaign contributions.

But on certiorari in *Agan I* the Georgia Supreme Court reversed, specifically rejecting Agan's First Amendment challenges to the jury charge. (*See* Appendix D.)

This Court denied certiorari in *Agan I,* presumably because the Georgia Supreme Court did affirm the collateral ruling by the Court of Appeals that the case should be remanded to the trial court for a hearing on Agan's claim of selective prosecution. After all, as indicated by

this Court in *Grayned v. City of Rockford, supra,* the danger of selective prosecution constitutes perhaps the principal evil of First Amendment vagueness and overbreadth in the context of criminal statutes.

After *Agan I* this Court formally adopted the Quid Pro Quo Rule for analogous Hobbs Act prosecutions, suggesting that a jury charge like the one in this case implicates "not only conduct that has long been thought to be well within the law, but also conduct that in a very real sense is unavoidable so long as election campaigns are financed by private contributions or expenditures, as they have been from the beginning of the Nation." *See McCormick v. U.S.,* ___ U.S. ___, 111 S.Ct. 1807, 1816 (1991).

The Present Case: *Agan II*

On September 17, 1987, Mr. Agan filed a Motion to Dismiss for Selective Prosecution and a Motion for Evidentiary Hearing, invoking *Yick Wo v. Hopkins,* 18 U.S. 356 (1886). (*See* Appendix G.) The trial court denied both Motions, finding that Mr. Agan's documentary evidence suggesting that other developers had made campaign contributions to commissioners at the same time they had matters pending before the Commission did not present a *prima facie* case of selective prosecution, even though none of the other developers had been prosecuted.

At his subsequent trial, Mr. Agan's counsel chose to put on no evidence. His defense relied instead on the inadequacy of the evidence to convict Agan in light of Agan's proposed Requests to Charge Nos. 2, 3, 4, and 8. Relying in part on language in the Georgia Ethics in Government Act, O.C.G.A. §21-5-3(6), those Requests

asserted that a valid campaign contribution can "reasonably be construed to encourage or influence a public officer holding elected office." Hence, the jury should not be left free to convict Agan simply on the basis that he had made a large campaign contribution at the same time that he was lobbying the commissioners on behalf of a zoning proposal. In short, Agan wanted the trial court to charge the jury that mere "chronological coincidence" between a large campaign contribution and lobbying by the contributor on a pending matter before the recipient, standing alone, does not suffice to anchor a bribery conviction, unless the State could prove other "something more" factors establishing beyond a reasonable doubt a corrupt intent to influence.

The trial court rejected those requests to charge. Instead, the court instructed the jury that a campaign contribution can have only *one* valid purpose, namely, that "of influencing the nomination for election or election of a person for office."

Stating its willingness to assume that Agan's proffer indicated proof of chronological coincidence, namely, that numerous other developers in DeKalb County had made sizable campaign contributions to County commissioners at the same time that they had zoning matters pending before them, the trial court concluded that mere *chronological coincidence* would not render those other developers "similarly situated," unprosecuted violators of the Georgia Bribery Statute. (Hearing I Transcript, p.6.)

The trial court stated that if all the State could show at trial was *chronological coincidence,* it would direct a verdict since the State has the burden of introducing other evidence to show "specific intent." (Hearing I Transcript, p.18.) Later, the Court reiterated its position:

> I don't mind telling you that if all the State puts up [is] the fact that your man made a campaign contribution at the same time there was something pending, they have a serious problem with [a] directed verdict.

(Hearing I Transcript, pp.25-26.)

Unfortunately, that critical legal theory was never communicated by the trial court to the jury. On the contrary, based on the trial court's instructions to them, that "specific intent" can be inferred from the "natural and probable consequences" of a man's actions, the jury was left free to infer criminal intent on Agan's part from the mere fact of chronological coincidence—and hence to convict him on that basis alone. (*See* Appendix F.)

The trial court's instructions to the jury, by failing to convey the legal principle (behind its earlier negative ruling on the issue of selective prosecution) that mere *chronological coincidence* is not enough to convict campaign contributors under the Georgia Bribery Statute, compounded the problem of selective prosecution in this case by actually inviting the jury to convict Agan out of general frustration with a prosecutorial system that allows "similarly situated" developers to make such contributions and buy influence with apparent impunity.

The Agan jury, with no suggestion from the trial court on the need to differentiate a good "influencing" campaign contribution from a bad "influencing" campaign contribution, convicted Agan on all counts on January 29, 1988, in less than two hours at the conclusion of a three-day trial.

The trial court sentenced Mr. Agan to serve seven years on each of the three counts upon which he was convicted, to run concurrently.

As indicated, the Court of Appeals reversed Agan's conviction on March 16, 1989. *Agan v. State*, 191 Ga.App. 92, 380 S.E.2d 757 (1989). Sitting *en banc*, the Court of Appeals agreed that the trial court should have charged the jury that making a valid campaign contribution at the same time that the contributor has a zoning application pending cannot be the basis for inferring a corrupt intent to bribe under the Bribery Statute, especially since the Ethics in Government Act specifically contemplates that a campaign contribution may have as its "natural and probable" *and legitimate* effect "influencing" an elected official in the performance of his duties. Hence the case was remanded for retrial based on a correct charge that "something more" factors are required. But Agan never received the benefit of that charge.

The State petitioned the Georgia Supreme Court for a Writ of Certiorari on or about April 14, 1989. The State claimed that the common sense proposition that the Agan jury should be charged that some "influencing" campaign contributions may be valid "would have a chilling effect on the State's ability to control the corruption of or attempts at corruption of public officials":

> Insisting that a trial court advise juries in a bribery case that campaign contributions may be made for the purpose of influencing public officials is tantamount to directing a verdict in favor of defendants like those in the instant case.

(Petition for a Writ of Certiorari, p. 60.)

On or about June 27, 1989, Attorney General Michael J. Bowers filed an Amicus Curiae brief on behalf of the State of Georgia. The Attorney General strenuously argued that the Georgia General Assembly, in passing the

Ethics in Government Act and requiring the disclosure of campaign contributions, could not have intended to immunize those contributions from bribery prosecution under O.C.G.A. § 16-10-2(a). The Attorney General argued that the Court of Appeals' decision would immunize *all* "chronologically-coincident" campaign contributions; whereas, in reality, as indicated by its decision not to free Agan, the Court of Appeals merely remanded the Agan case to require that the trial court intelligently instruct the jury on what "something more" factors would be needed to convert an otherwise valid "influencing" campaign contribution into a bribe. As indicated by the remand, such "something more" factors are arguably present in the Agan case.

But, in the absence of a valid charge to the jury on the necessity for the State to prove the existence of "something more" factors showing a corrupt intent to influence, Agan's conviction arguably had to be reversed *whether or not* a properly-instructed jury could have found that the requisite "something more" factors were present, based on the facts at hand:

> It may be that the jury found that none of the payments was a campaign contribution, but it is mere speculation that the jury convicted on this basis rather than on the impermissible basis that even though the first payment was such a contribution, McCormick's receipt of it was a violation of the Hobbs Act.

McCormick v. U.S., supra, 111 S.Ct. at 1817. *Accord,* L.H. Tribe, *American Constitutional Law,* p. 1028, n. 20 (2d Ed. 1988).

In *Agan I,* however, the District Attorney strenuously argued to the Georgia Supreme Court that it should reject

the common sense *quid pro quo* rule in favor of the dictates of ethical considerations and appearances—*i.e.*, in favor of the Chronological Coincidence Rule. As a result, he convinced the Court to adopt an "appearance of impropriety" standard in interpreting the Georgia Bribery Statute. The Court overruled the Court of Appeals and upheld the trial court's charge to the jury. In so doing, it vindicated the proposition that a jury in Georgia is free to infer the "specific intent" to bribe from the mere fact of Chronological Coincidence between a sufficiently large campaign contribution and a pending prospective zoning matter, since the "natural and probable consequence" of such a contribution could be to influence the recipient in his actions.

That was the revolutionary victory that the District Attorney won. It was a victory that is all the more remarkable in light of this Court's decision in *McCormick, supra*. It was a victory awarded to the District Attorney because of the obvious belief on the part of the Georgia Supreme Court that a "crackdown" was called for on local campaign finance abuses that had gone unchecked for too long--and that the District Attorney was embarked on such a "crackdown," which had to begin with someone—and that someone was Ramsey Agan. *Agan I, supra*, 384 S.E.2d at 869 n. 10.

While adopting a Chronological Coincidence or "appearance of impropriety" rule in *Agan I*, however, the Georgia Supreme Court agreed with the concerns raised by Agan that such a subjective rule could be abused by prosecutors and juries (especially in the sensitive First Amendment areas of campaign contributions and lobbying activities) and lead to the selective prosecution and conviction of politically unpopular persons or hapless

scapegoats. Accordingly, there was a powerful constitutional symmetry in the Supreme Court's decision in *Agan I* that the trial court and reviewing courts have inexplicably ignored in *Agan II*.

After a second hearing on the selective prosecution claim, the trial court entered the January 7, 1991, Order which is in effect the subject of this Petition. (*See* Appendix C.)

Against the background of *Agan I*, it is clear that it was incumbent upon the District Attorney to conduct some investigation into the circumstances surrounding the other apparent cases of Chronological Coincidence revealed by Agan's proffer. Conversely, if Agan could prove that the District Attorney had "conducted little or no investigation" into the existence of such apparently similar instances of Chronological Coincidence since his own indictment, the District Attorney would have a considerable burden of justification.

So what did District Attorney Wilson do in the face of Agan's initial proffer in 1987 on the matter of "chronological coincidence"? What did he do in the face of published reports, which he acknowledged knowing about (Hearing II Transcript, pp. 674, 661), that the DeKalb County Commission (on which so many of his friends and political cohorts sat) were receiving sizable campaign contributions (through the orchestration of his friend and political cohort, Doug Dillard) (Hearing II Transcript, pp. 660-61)? What did he do in the face of his own "assumption" that those contributions involved "chronological coincidence" (Hearing II Transcript, pp. 675-76)? What did he do in the face of the Supreme Court's opinion in *Agan I*, which clearly affirmed the importance of "chronological coincidence" in furnishing a basis in fact for juries

to infer corrupt intent on the part of the donor? What did he do in the face of the Supreme Court's stunning endorsement of his own apparent political courage in initiating a "crackdown" on corrupt local campaign practices that have gone unchecked for too long in Georgia?

The answer is simple. District Attorney Wilson did nothing!

Instead, District Attorney Wilson produced a tenuous and meaningless litany of "something more" factors to distinguish the conduct of Agan from that of the other contributing developers. Some of these "something more" factors were merely fabricated by District Attorney Wilson.[1]

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[1] This transcript of Agan's trial reveals that Wilson in effect manufactured many of the "something more" elements that he argued to the jury distinguished Agan from most other developers. For instance, he implied to the jury that it was improper for a campaign contribution check to be made out to a commissioner personally, even if the qualifying legend, "Campaign Contribution," appeared at the bottom. He also implied that it was improper for campaign contributions to be made out of season, when no active campaign is being conducted.
In fact, Commissioners Lanier and Fletcher whom Agan allegedly bribed now testify that they had received checks made out to them personally, even without a legend, which they had gladly accepted as campaign contributions (Hearing II Transcript, pp. 512 & 582), and that they had gladly accepted campaign contributions out of season. (Hearing II Transcript, pp. 488-90, 585.) They also indicated that Wilson had never bothered to ask them how often these "something more" elements were present in other cases of "chronologically coincident" campaign contributions, a fact which Wilson confirmed. (Hearing II Transcript, p. 703.)
At bottom, therefore, the one true element distinguishing Agan's case from all the rest was the willingness of Wilson's friends Lanier and Fletcher to turn State's evidence. Apparently, that is Wilson's current approach to bribery prosecutions. He

But in a larger sense they were all fabricated, since District Attorney Wilson made no effort to investigate any of the other situations of "chronological coincidence" to see whether or not his own "something more" factors might have been present. Nor, as just indicated, did he interrogate the County commissioners themselves to determine that in fact the "something more" factors that supposedly distinguish the Agan situation were not present in numerous other cases.

In short, as significant as his failure to prosecute others is District Attorney Wilson's total failure to investigate any other developers similarly situated with Agan on the basis of the Chronological Coincidence Rule. Again, as a *post hoc* justification for his total inaction, District Attorney Wilson makes up imaginary "something more" factors that supposedly differentiate the *Agan* case from the facts of other cases, which he concededly never bothered to investigate in the first place.

Unfortunately, the Court of Appeals accepted District Attorney Wilson's litany of "something more" factors at face value:

> When all these factors coalesce, appellant's situation becomes of a different category than the situations [of mere chronological coincidence] attempted to be shown at the hearing. We find

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claims that the Court of Appeals (in reversing the conviction of Agan's co-defendant) has completely tied his hands, so he intends to sit on them until one party to the attempted bribe or shakedown decides to turn the other in. (Hearing II Transcript, pp. 671-72.) That is totally irresponsible. It is putting the fox in charge of the hen house.

> no evidence that anyone else crossed *the line of illegality* as did appellant.

Appendix B (emphasis added). This conclusion embodied a cruel and ironic element of *deja vu*. In *Agan I* the Georgia Supreme Court, while interpreting its own selective prosecution precedents, overruled the trial court's previous decision on January 12, 1988, that Agan's original proffer of evidence of selective prosecution did *not* merit an evidentiary hearing, because he merely purported to show that "other developers made contributions while matters were pending"—with no "something more" factors thrown in. Yet, in its charge to the jury, the trial court had instructed the jury in such a way that it could find guilt on the basis of chronological coincidence alone.

What then is the "line of illegality" to which the Court of Appeals refers? Obviously, the panel of the Court of Appeals felt that the line was *not* crossed on the basis of "chronological coincidence" alone, but must involve "something more" factors. Yet, that is precisely what Agan argued unsuccessfully in *Agan I*. He argued that the jury had been erroneously charged that it could convict on the basis of "chronological coincidence" alone.

If District Attorney Wilson was so confident in his "something more" factors, then he should not have insisted on taking the case up on cert in *Agan I* in order to salvage the trial court's flawed jury charge, which allowed the jury to convict on the basis of "chronological coincidence" alone.[2]

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[2] In short, in the absence of a valid charge to the jury on the necessity for the State to prove the existence of "something more" factors showing a corrupt intent to influence, Mr. Agan's

Having done so, however, District Attorney Wilson cannot now have it both ways. If he was not willing to make the "something more" factors a critical ingredient in the Agan prosecution and jury charge, if he defended before the Georgia appellate courts the refusal by the trial court to charge the jury in such a fashion as to make it clear that the line of illegality lies on the far side of mere "chronological coincidence," he should not be heard to justify his refusal to prosecute anyone other than Agan on the basis of the supposed profusion of "something more" factors in the *Agan* case. Indeed, as indicated above, a number of these supposed "something more" factors were essentially fabricated by District Attorney Wilson as part of a cynical *post hoc* rationalization for his total inaction in seeking to apply the Chronological Coincidence Rule to anyone other than Ramsey Agan (T:659-60)—despite Agan's proffer of materials in 1987, Wilson's own suspicions of the widespread use of "chronologically-coincident" contributions (T:661, 675-76), and published reports to that effect (T:674, 661).

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conviction had to be reversed *whether or not* a properly instructed jury could have found that the requisite "something more" factors present, based on the facts at hand:

> It may be that the jury found that none of the payments was a campaign contribution, but it is mere speculation that the jury convicted on this basis rather than on the impermissible basis that even though the first payment was such a contribution, McCormick's receipt of it was a violation of the Hobbs Act.

McCormick v. U.S., supra, 111 S.Ct at 1817. *Accord,* L.H. Tribe, *American Constitutional Law,* p. 1028, n. 20 (2d Ed. 1988).

The Court of Appeals affirmed the decision below on January 22, 1992, on the basis of the District Attorney's litany of "something more" factors. (*See* Appendix B.)

In addition, the Court of Appeals upheld the decision, despite the acknowledged view of the trial court that "any alleged selective prosecution occurred at the time of indictment," as if the decision by the trial court to allow some post-indictment evidence into the record somehow altered its erroneous legal view. It was deemed immaterial that post-indictment the District Attorney spent years deliberately prosecuting this case all the way to the Georgia Supreme Court in *Agan I,* demanding that the Supreme Court reverse the Georgia Court of Appeals and place its *imprimatur* on the Chronological Coincidence Rule as a new prosecutorial weapon against public corruption in the State of Georgia, yet all the while, objectively speaking, Agan was and remains the victim of a *de facto* discriminatory classification under Georgia law, whereby he alone is prosecuted and all other makers of "chronologically-coincident" campaign contributions go free.

Likewise, despite the District Attorney's citation of the willingness of the local officials sought to be "bribed" in this case to turn State's evidence as a "something more" factor differentiating Agan's case from that of other unprosecuted makers of "chronologically-coincident" campaign contributions, the Court of Appeals rejected Agan's claim under federal law that he should be allowed to examine the motives of those State officials and impute them to the District Attorney.

On certiorari the Georgia Supreme Court declined to address the issues presented by this Petition. (*See* Appendix A.)

REASONS FOR GRANTING THE WRIT

Many states have similarly-worded bribery statues that were manifestly designed for a pre-PAC horse and buggy era. More particularly, they were not designed to be applied to elected officials at all[3], especially those with

[3] Accordingly, the Fifth Circuit in *United States v. Dozier*, 672 F.2d 531 (5th Cir. 1982), citing *Buckley v. Valeo, supra*, acknowledged that the constitutionally-protected status of fundraising activities may complicate the enforcement of old-line general bribery and extortion statutes. After all, the mere "[d]eman[d] for money by an *unelected* official may constitute extortion *per se*," 672 F.2d at 537 (emphasis added), just as in Georgia the mere receipt of money by an *unelected* official, which he has not earned ("to which he is not entitled"), where the recipient is in a position to officially help the donor, has traditionally warranted a presumption of an intent on the part of the donor to influence or bribe the official in Georgia. *See, e.g., Ingram v. State*, 97 Ga. App. 468, 473-74, 103 S.E.2d 666 (1958) (involving a policeman of the City of Atlanta); *Slaughter v. State*, 99 Ga. App. 239, 108 S.E.2d 161 (1959) (involving a Bibb County deputy sheriff and two Bibb County policemen).

Such legal presumptions, mirrored in the very language of the current Georgia Bribery Statute, may be especially useful where, as has often happened in the past, both parties were willing participants to the transaction and neither had a ready explanation of why one would be giving money to the other.

But where one of the parties to the transaction is an *elected* official, authorized under our system to solicit and receive contributions, the *Dozier* court points out that the convenient presumptions of old general bribery statutes fly out the window.

broad discretionary powers and a perceived duty to be responsive to the legitimate political grievances of their constituents.

Unfortunately, as numerous commentators have noted, once old bribery statues like Georgia's are applied literally to elected officials, there is no basis for distinguishing between a bribe and a protected campaign contribution other than the utterly vague notion of "corrupt" intent to influence, thus clearly implicating First Amendment vagueness/overbreadth concerns, especially in light of *Buckley v. Valeo*, 424 U.S. 1 (1971). *See, e.g.*, Note, *Campaign Contributions and Federal Bribery Law*, 92 Harv. L. Rev. 451, 453-55 (1978). Once it is conceded that a campaign contribution can be a "thing of value" for bribery purposes, "the result is that the potential sweep of the

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Accordingly, the Fifth Circuit inscribed a bright line around the presumed core purpose of the Hobbs Act:

> Whether described familiarly as a payoff or with the Latinate precision of *quid pro quo*, the prohibited exchange is the same: a public official may not demand payment as inducement for the *promise to perform* (or not to perform) an official act.

Id. as with Senator Brewster in *United States v. Brewster*, 506 F.2d 62 (D.C. Cir. 1974), the Defendant in *Dozier*, "who demanded specific amounts of money for specific favors," "f[ell] squarely within the 'hardcore' of the statute's proscriptions," as redefined. *Id.* at 540, quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 608, 93 S.Ct. 2908, 2914 (1973).

The approach taken by the *Dozier* court, therefore, is to rehabilitate old-line general extortion or bribery statutes, to the extent they implicate campaign contributions or fund-raising activities, by requiring proof of an explicit demand or promise of a *quid pro quo* arrangement, as the case may be. *See also People v. Brandstetter*, 103 Ill.App.3d 359, 430 N.E.2d 731, 736 (1982) *cert. denied*, 459 U.S. 988, 103 S.Ct. 342 (1982).

bribery statutes is enormous." Lowenstein, *Political Bribery and the Intermediate Theory of Politics*, 52 U.C.L.A. L. Rev. 784, 809 (1985) ("Political Bribery").

To avoid that standardless sweep, numerous courts[4], expressly seeking to reconcile antique bribery statutes with modern First Amendment norms, have found a solid core of constitutionally proscribable activity only through application of the "bright line" of the Quid Pro Quo Rule.

In selecting the Quid Pro Quo Rule as the only logical way to interpret the federal bribery statute, this Court stated as follows:

> *Whatever ethical considerations and appearances may indicate,* to hold that legislators commit the federal crime of extortion when they act for the benefit of constituents or support legislation furthering the interests of some of their constituents, shortly before or after campaign contributions are solicited and received from those beneficiaries, is an unrealistic assessment of what Congress could have meant by making it a crime to obtain property from another, with his consent, under cover of official right. To hold otherwise would open to prosecution not only conduct that has long been thought to be well within the law, but also conduct that in a very real sense is unavoidable so long as election campaigns are financed by private contributions or expenditures, as they have been since the beginning of the nation. It would require statutory language more explicit than the Hobbs Act contains to justify a contrary conclusion.

111 S.Ct. at 1816 (emphasis added).

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[4] *See* note 3, *supra*.

Likewise, this Court found that a new trial was required in *McCormick* because the original jury instructions would have permitted the jury to convict on the basis of mere Chronological Coincidence:

> It may be that the jury found that none of the payments was a campaign contribution, but it is mere speculation that the jury convicted on this basis rather than on the impermissible basis that even though the . . . payment was such a contribution, McCormick's receipt of it was a violation of the Hobbs Act.

111 S.Ct. at 1817

In order to uphold Agan's conviction, the Georgia Supreme Court *had* to endorse the Chronological Coincidence Rule, since the charge by the trial court allowed the jury to infer corrupt intent to bribe on that basis alone, even in the complete absence of any "something more" factors. Accordingly, the Georgia Supreme Court remanded the case to the trial court for a hearing on the question of selective prosecution. Agan's original proffer contained evidence of the fact that other unprosecuted developers had apparently made "money transfers . . . to the two commissioners contemporaneously with the pendency before the County Commission of applications that had been filed on behalf of such donors"—that is, evidence of Chronological Coincidence. 384 S.E.2d at 868.

Writing in 1985 Professor Lowenstein formally proposed that the nationwide crisis of legislative timidity in dealing with local campaign finance corruption be solved by prosecutors and the courts:

> It is a significant and politically relevant fact that under our present system of campaign finance, politicians and interest groups engage

> routinely, not in "legalized bribery," as is commonly supposed, but in felonious bribery that goes unprosecuted primarily because the crime is so pervasive.

Political Bribery, supra, at 848. In short, understandably frustrated with the *status quo* and ignoring the First Amendment implications of his proposal, Professor Lowenstein recommended that the nation's antique bribery statutes be dusted off and applied with extreme literalness to all "influencing" campaign contributions—a recommendation that the Georgia Supreme Court has now unflinchingly adopted. In the process it armed Georgia prosecutors, judges, and juries with a spiked club with high potential for First Amendment mischief.

Yet, the very nature of the Chronological Coincidence Rule (so zealously advocated by Professor Lowenstein and demanded by the District Attorney) must be understood to impose an important symmetrical constitutional demand on prosecutors to justify in a *principled way* their "line-drawing" decisions about which cases to prosecute under this broad new Rule—especially where only *one* individual is singled out.

In the case of *Yick Wo v. Hopkins,* 18 U.S. 356, 6 S.Ct. 1064 (1886), a City Ordinance of San Francisco gave the Board of Supervisors authority, at their discretion, to refuse permission to carry on commercial laundries, except where located in buildings of brick or stone. Approximately 310 of the 320 laundries in San Francisco were constructed of wood and approximately 240 of those were owned and operated by subjects of China. These Chinese petitioned the Board of Supervisors for permission to continue their businesses in their accustomed structures, but *all* such petitioners were denied; whereas,

all the petitions of those who were not Chinese, with one exception, were granted.

Quoting from the Maryland case of *City of Baltimore v. Radecke*, 49 Md. 217, the *Yick Wo* court observed that it is unacceptable for criminal statutes or regulatory rules to "commi[t] to the unrestrained will of a single public officer" the literal right to bring catastrophic prosecutions or enforcement actions in potentially hundreds of cases (where by consensus such action would be inappropriate in *many* such cases) with no explanation of how he should responsibly decide which cases to prosecute—that is, unless the official adopts a systematic approach to the dilemma and articulates a principled basis for "drawing the line" between hard-core and peripheral violators. The City of Baltimore Ordinance provided that individual permits to use the ubiquitous steam engines within the City could be revoked at any time by the Mayor upon six months' notice. 6 S.Ct. at 1072.

The analogy to the *Agan* case should be clear. The Chronological Coincidence Rule, adopted by the Georgia Supreme Court in *Agan I* and advocated nationwide by many, makes it possible for a district attorney to pursue potentially hundreds, if not thousands, of prosecutions against well-known developers and PACs, who have concededly made large campaign contributions while they had legislation pending in which they were directly interested.

Indeed, in the aftermath of *Agan I*, Attorney General Bowers of Georgia suggested that *all* PAC contributions may be illegal under Georgia's Bribery Statute since their manifest purpose is to influence legislation. *The Atlanta Constitution* [6/23/91], p. D-10. Declining to speculate whether or where a principled line could be drawn in

making the decision to prosecute, the Attorney General went ahead to equate "a free lunch" to bribery when "chronological coincident" to lobbying activities. *The Atlanta Constitution* [3/16/91], p. A-12. Again, the same article emphasized that while the Attorney General said he would "probably" not prosecute such a "free lunch" case, "he decline[d] to say where he draws the line." *Id.*

The Attorney General filed an Amicus brief in *Agan I* in favor of the Chronological Coincidence Rule. His post-*Agan I* public statements, coupled with the statewide lack of any other prosecutions on the basis of "chronologically-coincident" campaign contributions, led one State Senator to conclude that the Attorney General's open-ended interpretation of the Bribery Statute had rendered the law a "piece of junk":

> [As interpreted by Bowers,] the law is so broad that it could be abused by any prosecutor who wants to destroy a political enemy, Mr. Dawkins said.

The Atlanta Constitution [3/14/92], p. B-3.

Likewise, the *Yick Wo* Court underlined the danger if a single public officer—empowered to prosecute hundreds of cases under a broad rule like the Chronological Coincidence Rule—decides to prosecute many fewer than all:

> [I]f he should not choose to [prosecute all], but only to act in particular cases, there is nothing in the Ordinance to guide or control his action. It lays down no rules by which its impartial execution can be secured, or partiality and oppression prevented. . . . [A]nd, when we remember that this action or non-action may proceed from enmity or prejudice, from partisan zeal or animosity, from favoritism and other improper influences and motives easy of concealment,

> and difficult to be detected and exposed, it becomes unnecessary to suggest or comment upon the injustice capable of being wrought under cover of such a power, for that becomes apparent to everyone who gives to the subject a moment's consideration.

6 S.Ct. at 1072.

That is not to say, however, that an ordinance or statute involving a broad rule like the Chronological Coincidence Rule cannot be subject to principled limitations in practice that protect against the unequal, unjust, and possibly partisan discrimination feared by this Court in *Yick Wo*. The pressing need for a principled and articulate basis for "line drawing" in this very context is underscored by this Court's decision in *McCormick, supra*.

Of course, in *Yick Wo* the operative facts were that a single race had been singled out for disparate treatment, and no good or principled reason was adduced by the State to justify the stark contrast in treatment. 6 S.Ct. at 1073.

In these circumstances it is clear that Agan does not need to establish that he was a member of some racial, religious, or other traditional suspect or arbitrary *classification*, like the petitioner in *Yick Wo*. Rather, as the Georgia Supreme Court correctly noted in *Agan I*, it is sufficient for Agan to demonstrate that "all" similar offenses have gone uninvestigated or unprosecuted, so that he becomes by deduction the victim of "an arbitrary classification whereby only [he] continues to be prosecuted while all the rest go free. Such a conclusion would equate to selective prosecution." 259 Ga. at 548-549, 384 S.E.2d at 869.

The trial court ignored this clear possibility of arbitrary *individual* discrimination by insisting that the focus

should be on the existence of some traditional "arbitrary classification":

> While the defendant has shown that other developers have made campaign contributions while they had matters pending before the county commission, the court does not believe this evidence is sufficient to void Agan's conviction.
>
> The appropriate focus in a motion for selective prosecution is whether the District Attorney deliberately discriminated against the Defendant based on an unjustifiable standard, such as race, religion, or some other arbitrary classification. *State v. Causey*, 246 Ga. 735, 737, 273 S.E.2d 6 (1980), quoting *Yick Wo v. Hopkins*, 18 U.S. 356 (1985).

See Appendix C.

The majority opinion in *Snowden v. Hughes*, 321 U.S. 1, 64 S.Ct. 397 (1943), noted that any denial of equal protection may be shown by extrinsic evidence showing a discriminatory design *or* it "may appear on the face of the action taken with respect to *the particular* class or *person*, *cf. McFarland v. American Sugar Refining Co.*, 241 U.S. 79, 86, 87, 36 S.Ct. 498, 501 . . . [1916]." *Snowden v. Hughes*, *supra*, 321 U.S. at 8, 64 S.Ct. at 401. Justice Frankfurter clarified the essential point in his concurrence:

> [I]n forbidding a state to "deny to any person within its jurisdiction the equal protection of the laws," the Fourteenth Amendment does not permit a state to deny the equal protection of its laws because such denial is not wholesale. The talk in some of the cases about systematic discrimination is only a way of indicating that in order to give rise to a constitutional grievance a departure from a norm must be rooted in design and not derived merely from error or fallible

> judgment. Speaking of a situation in which conscious discrimination by a state touches the *"plaintiff alone,"* this Court tersely expressed the governing principle by observing that we suppose that no one would contend that the plaintiff was given the equal protection of the laws." [*Citing McFarland v. American Sugar Refining Co., supra.*]

321 U.S. at 15-16, 64 S.Ct. at 404-05 (emphasis added).

The *American Sugar Refining Co.* majority, in an opinion authored by Justice Holmes, struck down the provisions of a Louisiana statute which "bristle[d] with severities that touched the plaintiff [sugar refining company] alone." 241 U.S. at 86, 36 S.Ct. at 501. This is especially so in a criminal law context bristling with First Amendment implications.

Agan has been intentionally singled out by the District Attorney for discriminatory prosecution, not just under the Bribery Statute, but especially under the Chronological Coincidence Rule. As the Georgia Supreme Court noted in footnote 14 of *Agan I*: "[t]he passage of time may be important here." 384 S.E.2d at n. 14. Yet the trial court stubbornly insisted that the only relevant moment in time was the instant of indictment.

The initial hearing on selective prosecution was held in November of 1987. Accordingly, for two years thereafter the District Attorney continued to prosecute Agan through the Georgia court system, all the while seeking judicial ratification of a Chronological Coincidence Rule that would allow a jury to convict purely on the basis of the reasonable inferences that can be drawn from the fact that a defendant made a substantial campaign contribution to a recipient before whom he had a pending zoning matter, without any necessary "something more" factors.

But, when all was said and done, and the Chronological Coincidence Rule was vindicated and Agan's conviction affirmed (subject to a rehearing on the matter of selective prosecution), the District Attorney in the context of that selective prosecution hearing squarely repudiated the Chronological Coincidence Rule as either non-existent or a dead letter, because of the presence of "something more" factors in this case and the supposed pretrial necessity of "something more" factors to secure a conviction in any case.

Also, as reflected in the opinion of the Court of Appeals, there were numerous evidentiary rulings by the trial court, which prevented Agan from inquiring into the motives of the two County commissioners, who turned State's evidence, despite the District Attorney's successful citation of that fact as evidence of a "something more" factor distinguishing the *Agan* case from that of all other unprosecuted makers of "chronologically-coincident" campaign contributions *and* despite Agan's desire to impute the motives of those State actors to the District Attorney.

Numerous legal theories suggest that conclusion was wrong. First, even if the possible discriminatory conduct of the commissioners were that of purely private actors, it would constitute unconstitutional "state action" if there was a sufficient symbiosis/nexus/joint participation between the commissioners and the District Attorney. *See Burton v. Wilmington Parking Authority,* 365 U.S. 715 (1961) and *Moose Lodge No. 107 v. Irvis,* 407 U.S. 163 (1972). For instance, a state is vulnerable to a charge of purposeful racial discrimination if it casts its "electoral process in a form which permits a private [political] organization

[through a whites-only primary] to practice racial discrimination in the election." *Smith v. Allwright*, 321 U.S. 649, 664 (1944). The same conclusion follows where, as here, the District Attorney has structured his prosecutorial apparatus in such a way as to devolve upon a self-interested group like the commissioners the effective right to decide whom to prosecute for making campaign contributions.

That conclusion is fortified by the "symbiotic" or interdependent relationship that exists between the District Attorney and his friends and political cohorts on the County Commission. *Cf. Burton v. Wilmington Parking Authority, supra.* The United States Court of Appeals for the Eighth Circuit held that there could be sufficient evidence of joint, symbiotic activity for "state action" purposes where a prosecuting attorney prosecuted a shoplifting suspect on the word of a private security guard, where the security guard was also an employee of the police department and had a close personal relationship with the prosecuting attorney. *Murray v. Wal-Mart, Inc.*, 874 F.2d 555 (8th Cir. 1989).

Moreover, in this case the two County commissioners were in effect official state actors to begin with, since under the District Attorney's approach to prosecuting those who attempt to bribe elected public officials with campaign contributions, the public officials themselves are required to turn state's evidence; and this Court has said that the slightest overt official involvement, even by the lowest functionary, will tip the balance in doubtful cases in the direction of a finding of "state action." *See Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 941-42 (1982) and *Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149, 157 (1978).

CONCLUSION

FOR THE REASONS SET FORTH ABOVE A WRIT OF CERTIORARI SHOULD ISSUE TO REVIEW THE JUDGMENT AND OPINION OF THE SUPREME COURT OF GEORGIA IN THIS MATTER.

DATED: May 26, 1993.

Respectfully submitted,

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APPENDIX A

In the Supreme Court of Georgia

Decided: FEB 25 1993

S92G0833. AGAN v. THE STATE.

FLETCHER, Justice.

We granted the writ of certiorari to consider whether the trial court erred in excluding post-indictment evidence related to Ramsey Agan's claim that the district attorney failed to investigate corrupt campaign practices. See *Agan v. State*, 203 Ga. App. 363, 366 (417 SE2d 156) (1992). Although Agan contends that the trial court consistently denied his attempts to introduce post-indictment evidence at the hearing on his claim of selective prosecution, the record shows that no limitation was placed on the time or subject of the district attorney's testimony. In addition, the trial court permitted Agan to introduce evidence of post-indictment campaign contributions made to commissioners by other developers while their zoning applications were pending.

A trial court's rulings on the relevancy of evidence will not be disturbed unless there is an abuse of discretion. *Anderson v. State*, 258 Ga. 278, 279 (368 SE2d 508) (1988). Given the district attorney's testimony and the admission of other post-indictment evidence, we conclude the trial court did not abuse its discretion in ruling on the admissibility of evidence.

Judgment affirmed. Clarke, C.J., Hunt, P.J., Benham, Sears-Collins and Hunstein, JJ., concur.

APPENDIX B

NOTICE: MOTIONS FOR RECONSIDERATION MUST BE RECEIVED IN OUR CLERK'S OFFICE WITHIN TEN DAYS OF THE DATE OF DECISION to be deemed timely filed. (Court of Appeals Rules 4 and 48, March 1, 1985)

JAN 22 1992

In the Court of Appeals of Georgia

A91A1597. AGAN v. THE STATE. Co-C075.

COOPER, Judge.

This is the second appearance of this case in this court. Ramsey Agan, the Honorary Turkish Consul in Atlanta, and a codefendant, Dr. Rauf Sarper, were indicted for bribery in 1987 and in 1988, after a trial by jury, were convicted. Our first opinion, *Agan v. State*, 191 Ga. App. 92 (380 SE2d 757) (1989), contains a complete discussion of the facts leading to the indictments. Agan and Sarper transferred in excess of $7000 denominated as campaign contributions to two Dekalb county [sic] commissioners, in an attempt to gain their favorable votes on a zoning variance for property owned by Agan. Prior to trial, Agan and Sarper filed a joint motion to dismiss for selective prosecution and requested a full evidentiary hearing on that issue. The trial court held a pre-trial hearing on the motion at which a proffer of evidence was made by the defendants, yet the trial court concluded

that the proffer was not sufficient to warrant an evidentiary hearing and denied the motion to dismiss. Defendants appealed their convictions, and this court reversed both convictions in *Agan*, supra. Sarper's conviction was reversed on the general grounds, and Agan's conviction was reversed on the jury charge and certain evidentiary issues. This court also determined that, based on the proffer of evidence by the defendants, the trial court erred in denying an evidentiary hearing on the issue of selective prosecution. The Georgia Supreme Court, in *State v. Agan*, 259 Ga. 541 (384 SE2d 863) (1989), declined to review the decision reversing Sarper's conviction, yet reversed this court with respect to Agan on the jury charge and rejected certain constitutional arguments raised by Agan. Nevertheless, the Supreme Court affirmed this court's decision on the issue of selective prosecution and remanded the case to the trial court with direction that an evidentiary hearing be accorded to Agan on his proffer. Pursuant to that direction, the trial court held a full evidentiary hearing on Agan's claim of selective prosecution and after hearing the evidence, issued an order in which Agan's motion to dismiss was denied because the court determined that Agan had not carried his burden to prove selective prosecution. It is from this order that Agan now appeals, raising six enumerations of error.

1. Appellant first enumerates that the trial court erred in ruling that he failed to prove the existence of selective prosecution in his case. " 'Some selective enforcement is not in itself a constitutional violation. [Cit.] To be a constitutional violation, the selective

enforcement must represent an intentional and purposeful discrimination based upon some unjustifiable standard such as race, religion, or other arbitrary classification. [Cits.]' [Cits.] 'The burden is on the defendant to prove a selective prosecution by showing (1) that others *generally* are not prosecuted for the same misconduct, and (2) the decision to prosecute him was based upon impermissible grounds such as race, religion or exercise of constitutional rights.' [Cits.]" *State v. Jackson,* 188 Ga. App. 259 (2) (372 SE2d 823) (1988). See *Sabel v. State,* 250 Ga. App. 640 (4) (300 SE2d 663) (1983); *State v. Causey,* 246 Ga. 735 (2) (273 SE2d 6) (1980). As stated in *Georgia Dept. of Natural Resources v. Timber Corp.,* 258 Ga. 873 (3) (375 SE2d 856) (1989), "[appellant] had the burden of presenting sufficient evidence of intentional or purposeful discrimination, . . . [Cit.], which burden would not have been carried even if it had been shown that other persons or classes of persons may have violated the law without being prosecuted therefor. [Cit.]" In the instant case, the Georgia Supreme Court specified the evidence necessary for appellant to carry his burden, the response required of the State to counter appellant's proof, and the proof that would be sufficient to support an inference of the existence of discrimination by the trier of fact. The Supreme Court stated:

> "[T]he fact that only one person is prosecuted for doing what many others do is no warrant, in itself, for relief. Agan has the burden of proving by the weight of the evidence that his prosecution represents an an [sic] 'intentional or purposeful discrimination which is deliberately based upon an unjustifiable standard, such as race, religion, or other arbitrary classification.'

> This he must establish, if he can, by proving the averments of the proffer relative to other money transfers, and by showing, through the testimony of the district attorney or otherwise, the extent of any other investigations or prosecutions of donors *who are situated similarly*. If, notwithstanding the disclosure to the district attorney of the proffer materials, it should appear that he has conducted little or no investigation into *apparently similar offenses*, or has initiated no prosecutions of any such offenses, only then would it be incumbent upon the district attorney to demonstrate that the prosecution of Agan is something other than selective prosecution.
>
> Depending upon the evidence, the trial judge as trier of fact might find that similar offenses have gone uninvestigated or unprosecuted; that the district attorney knew or should have known of such offenses; and that failure to act is without a reasonable and responsible explanation. Based on such a finding, the trier of fact might conclude that the circumstances support an inference of the existence of 'intentional or purposeful discrimination' based upon an 'unjustifiable standard' of an 'arbitrary classification' – that is, an arbitrary classification whereby *only* Agan continues to be prosecuted, and all the rest go free. Such a conclusion would equate to selective prosecution." *State v. Agan*, supra at 548-549. (Footnotes ommitted [sic].) (Emphasis added.)

At the evidentiary hearing before the trial court, appellant extensively examined four public officials, seven major real estate developers in the Atlanta area, a lawyer who represents many major developers in zoning

matters, the two commissioners contacted by appellant and the district attorney, in an attempt to meet his burden of proof. Appellant subpoenaed public and personal records from the witnesses, and he presented evidence gleaned from the records produced. Appellant's proof at the hearing centered primarily on his theory of "chronological coincidence." Appellant contended that the first part of his burden was met by his proof that several other developers who were not prosecuted or even investigated had made campaign contributions to Dekalb [sic] County Commissioners at the time they had zoning matters pending before the commission. Appellant further argued and attempted to show that the two commissioners involved in this case were accepting money from these other developers for their favorable zoning votes and, in an attempt to deflect scrutiny from themselves, they reported Agan to focus attention upon him and to satisfy the public desire for investigation into these practices. Appellant completed his theory by attempting to prove that there was a "good old boy" conspiratorial network in Dekalb [sic] County consisting of the major real estate developers, attorney Douglas Dillard, a prominent zoning attorney, Manuel Maloof, the chief executive officer of Dekalb [sic] County, and Robert Wilson ("Wilson"), the Dekalb [sic] County District Attorney. Appellant contended, and endeavored to prove, that this "network" sustained and protected the practice of contributing to commissioners' campaigns to gain favorable zoning votes in return. Appellant alleged that this network, especially Manuel Maloof, was prejudiced against Turkish nationals and that all the discriminatory, prejudicial and conspiratorial motives of the "network" are imputed to the

district attorney, thereby resulting in a prosecution selectively and discriminatorially [sic] focused on Turkish foreigners who were outside the system. The trial court, while acknowledging that appellant did in fact prove that other developers had made campaign contributions while they had zoning matters pending before the county commission, failed to find any evidence of intentional or purposeful discrimination that generated the prosecution of appellant. Based on the evidence received at the hearing, the trial court concluded that the district attorney responded only to the evidence he had in appellant's case and that he had not failed to prosecute any other case with similar information. The trial court, citing the existing case law on selective prosecution, determined that proof of other campaign contributions alone, without proof of intentional discrimination by the district attorney, was not sufficient to void appellant's conviction on the grounds of selective prosecution.

We agree with the trial court. We have read and reviewed the entire transcript before us, including all the testimony and the documents produced. Appellant has not met the burden of proof set forth in *Jackson*, supra, and the other cases cited herein, nor has he presented the proof required to support an inference of discrimination per the Supreme Court's statement in *State v. Agan*, supra. First, appellant has not shown that others in a similar situation were not prosecuted. While appellant did show that other developers made contributions while they had zoning matters pending, he failed to show that the contributions of those developers were accompanied by the following factors attendant to the contributions made by appellant: the contributions were made at a time when

the commissioners did not have an active campaign structure; appellant propounded his zoning request at the same meeting that he gave the contributions, in envelopes, directly to the commissioners; at the same meetings, appellant promised future contributions; the checks were make out to the commissioners personally rather than to their campaigns; appellant was very persistent in talking to the commissioners and giving them contributions; a videotape of the contact with the commissioners was made and was available as evidence; the votes of either of the two commissioners involved was necessary for appellant's zoning to be passed; and the two commissioners approached the district attorney with the evidence of the bribe. When all these factors coalesce, appellant's situatior [sic] becomes of a different category than the situations attempted to be shown at the hearing. We find no evidence that anyone else crossed the line of illegality as did appellant. While the district attorney indicated that other situations may appear improper, appellant failed to show that the district attorney knew or should have known of other situations in which the line of illegality was crossed. Despite appellant's failure to prove similarly situated persons, appellant likewise failed to prove any intentional discriminatory motive of Wilson and the district attorney's office. As the trial court reiterated, the motives of the commissioners or Manuel Maloof, whatever they may be, are irrelevant unless shared by Wilson, thereby affecting his decision to prosecute. The federal cases cited by appellant in an attempt to impute the supposed motives of others to Wilson are inapposite and we find appellant's theory disingenuous. Considering Wilson's testimony and the other testimony

presented in detail, there is no proof that Wilson prosecuted appellant for any reason other than good faith law enforcement. Moreover, there is no evidence to support the inference of discrimination as set forth in *State v. Agan*, supra. As just stated, appellant did not present similar situations that went uninvestigated, nor did appellant show that Wilson had access to information such that he knew or should have known of any similar situation. Wilson testified that he was only aware of a public perception that developers make large contributions to commissioners in an attempt to get their zoning requests passed; however he stated that he cannot convene grand juries or prosecute based upon what he reads in the newspaper. The testimony showed that Wilson was not aware of any specific case, nor did he ignore any information that was brought to his attention. In the wake of appellant's case, Wilson investigated and questioned each commissioner about their campaign contributions and discovered no other situations with the factors that coalesced in appellant's case. Wilson stated that he could not prosecute without evidence and with no basis to believe that bribery had occurred. Wilson's testimony establishes a reasonable explanation for his prosecutorial decisions and supports the conclusion of a good faith prosecution of appellant. Appellant's first enumeration has no merit.

2. Appellant next contends that the trial court erred in referring to the reversal of Sarper's conviction as an indication of the amount of proof necessary for the district attorney to proceed with a bribery case. In its order, the trial court commented on the reversal of Sarper's conviction, stating that "[i]t is most anomalous to now

believe the district attorney should proceed against other developers when the appellant [sic] courts would not even sustain Sarper's conviction. If anything, the reversal of Sarper's conviction suggests even more evidence is necessary before a district attorney can present an indictment in this type of case." While we do not feel that these comments regarding Sarper's conviction were necessarily correct or necessarily relevant to the issue before the trial court, the remainder of the trial court order and the decision reached by the court is otherwise correct, as we held in Division 1. Therefore, these comments do not constitute reversible error since " 'we have consistently held that a correct decision of a trial court will not be reversed, regardless of the reasons given therefor.' [Cit.]" *Colquitt v. State,* 196 Ga. App. 817 (1) (397 SE2d 164) (1990).

3. In his remaining enumerations, appellant asserts that the trial court erred in placing time limitations on the subpoenas issued to the witnesses and in excluding evidence that related to certain time periods as irrelevant. The trial court limited the subpoenas issued to the developer witnesses and required them to produce personal documents relating only to the two years prior to appellant's indictment in 1987. Appellant's original subpoenas requested the developers' and the commissioners' personal documents from 1983 to the time of the hearing in 1990. The trial court, although first limiting the commissioners' subpoenas to the two years prior to the indictment, later allowed appellant to request all personal documents of the commissioners from 1982 to the time of the indictment. The public records subpoenaed by appellant were not limited by the trial court. The transcript

reveals that the testimony of the developers and the commissioners was not strictly limited with respect to time, so that many questions relating to events after the indictment and prior to 1985 were allowed. The trial court held the view that since any alleged selective prosecution occurred at the time of the indictment, post indictment documentary evidence was irrelevant. However, the testimony of the district attorney was not limited accordingly, and appellant was able to question Wilson on matters relating to any time period. Further, the trial court reiterated during the hearing that he would keep an open mind, and if the relevance of any evidence were shown, he would expand his ruling. The specific evidentiary rulings cited by appellant were based upon the trial court's conclusion that the evidence was not relevant to the specific issue at hand – selective prosecution. " 'Even though our rule favors the admission of relevant evidence, the admission or exclusion of evidence which is objected to on the ground of relevancy lies within the sound discretion of the trial court, whose decision will not be disturbed on appeal absent a clear abuse of discretion.' [Cit.]" *Barnwell v. State,* 197 Ga. App. 116 (5) (397 SE2d 717) (1990). The Georgia Supreme Court recognized the necessity of "reasonable time limits" on the documentary evidence produced, see *State v. Agan,* supra at 548 n. 12, and our review of the record reveals no abuse of the trial court's discretion, no error in his rulings and no barriers to the full presentation of appellant's case. These enumerations are, likewise, without merit.

Judgment affirmed. Birdsong, P. J., and Pope, J., concur.

APPENDIX C

IN THE SUPERIOR COURT OF DEKALB COUNTY
STATE OF GEORGIA

STATE OF GEORGIA,	*	CRIMINAL NO. 87CR3893
v.	*	ORDER ON MOTION TO DISMISS FOR SELECTIVE PROSECUTION (Filed Jan. 7, 1991)
RAMSEY AGAN,	*	
Defendant.	*	

This case is before the court to decide defendant Ramsey Agan's motion to dismiss for selective prosecution. Agan was tried and convicted of bribing two county commissioners. On appeal, the Supreme Court of Georgia affirmed the jury verdict, but directed the trial court to conduct an evidentiary hearing on the question of selective prosecution. *State v. Agan,* 259 Ga. 541, 546, 384 SE2d 863 (1989), *cert. denied,* 110 S.Ct. 1526. After considering the evidence presented at the hearing and the law, the court denies the motion.

The defendant contends he should not be prosecuted because others in similar circumstances have not been prosecuted by the district attorney. He argues he was singled out for prosecution because of his Turkish origin.

The court finds no evidence of intentional or purposeful discrimination in this case. While the defendant has shown that other developers have made campaign contributions while they had matters pending before the county commission, the court does not believe this evidence is sufficient to void Agan's conviction. The appropriate focus in a motion for selective prosecution is whether the district attorney deliberately discriminated

against the defendant based on an unjustifiable standard, such as race, religion or some other arbitrary classification. *State v. Causey,* 246 Ga. 735, 737, 273 SE2d 6 (1980), quoting *Yick Wo v. Hopkins,* 118 U.S. 356 (1885).

The evidence establishes the district attorney decided to investigate when the county commissioners in question reported to the police they believed they were being offered a bribe. Except for one instance considerably earlier involving another district attorney, no one has suggested this district attorney has failed to prosecute or present to the grand jury any case with similar information. With the evidence presented to him, the district attorney then decided to videotape the meetings with the defendant to see if the defendant's conduct would satisfy the very specific intent requirement of the state bribery law, O.C.G.A. 16-10-2. After reviewing these videotapes, the district attorney presented the case to a grand jury.

The state argues bribery is quite difficult to prove. More evidence is required than the mere fact of campaign contributions while zoning matters are pending. Indeed, although a jury unanimously found co-defendant Sarper guilty of bribery, both appellate courts of this state overturned his conviction because of insufficient evidence. It is most anomalous to now believe the district attorney should proceed against other developers when the appellate courts would not even sustain Sarper's conviction. If anything, the reversal of Sarper's conviction suggests even more evidence is necessary before a district attorney can present an indictment in this type of case.

Defendant spends much time and effort rearguing why he never should have been convicted by the jury. His

recitation of facts tries to show he did nothing more than others have done. The jury in this case heard his explanation and also watched the videotapes in question. They then decided to covict [sic] him of bribery. Defendant's guilt or innocence is no longer an issue.

Because defendant Agan has not carried his burden of proving selective prosecution, his motion to dismiss is hereby DENIED.

So ORDERED this 7th day of January, 1991.

/s/ Robert J. Castellani
ROBERT J. CASTELLANI,
JUDGE
STONE MOUNTAIN
JUDICIAL CIRCUIT

Copies to: Jake Arbes
Tom Clegg
Barbara Conroy
Bobby Lee Cook

APPENDIX D

In the Supreme Court of Georgia

Decided: 10/26/89

46967. THE STATE v. AGAN ET AL.

HUNT, Justice.

We granted certiorari to the Court of Appeals in *Agan v. State,* 191 Ga. App. 92 (380 SE2d 757) (1989) to review that opinion, with emphasis upon "[t]he correct interpretation of the offering of a bribe, as prohibited by OCGA § 16-10-2(a)(1), and the acceptance of a 'campaign contribution,' as defined in OCGA § 21-5-3(6)."

The facts, more fully set forth in the Court of Appeals' opinion, are summarized as follows. Agan, the Honorary Turkish Consul in Atlanta, sought a building height variance for the construction of a hotel on his property. Agan and Sarper, an Emory University professor, had discussed with officials of the Emory Medical Clinic a plan to bring Turkish patients to the Clinic who would stay at the hotel. The Dekalb [sic] County Commission had twice rejected Agan's application for a variance. Agan submitted a third application, and spoke with two Dekalb [sic] County commissioners, Lanier and Fletcher, inquiring what Agan could do to insure the approval of his application. Agan told Fletcher he had a number of friends in the local Turkish-American Association who wished to contribute to Fletcher's campaign. At a meeting between Agan and Fletcher, Agan urged Fletcher to support the variance application, then left Fletcher with four checks totaling $3,700.00, made to

Fletcher personally, and marked "for campaign contribution," despite Fletcher's protests that he did not even have a campaign bank account. The checks were drawn on the accounts of Sarper and three others who testified they were reimbursed for the checks by Agan and believed Agan wanted contributions to come from different people in order to give the impression he enjoyed broad support in the Turkish community. After another meeting between Agan and Fletcher in which Agan reiterated his need for the variance, Agan presented Fletcher with a fifth check for $800.00 marked as a campaign contribution, from a third party. Agan, accompanied by Sarper, also met with Lanier to discuss the variance. As they left Lanier's office, Sarper gave Agan an envelope at Agan's request and, back in Lanier's office, without Sarper, Agan presented Lanier with the envelope containing Sarper's check to Lanier for $3,000.00 marked "campaign contribution," despite Lanier's statement to him that he was not up for re-election for three years. The Court of Appeals, on appeal from Sarper and Agan's convictions for bribery, ordered a new trial for Agan, and vacated Sarper's conviction for insufficient evidence.

Sufficiency of the Evidence

1(a). The Court of Appeals correctly determined under the standard established by *Jackson v. Virginia*, 443 US 307 (99 SC 2781, 61 LE2d 560) (1979), that a rational trier of fact could have found the essential elements of the crime of bribery to have been established beyond a reasonable doubt in regard to Agan. There was ample evidence at trial that Agan gave payments to Lanier and Fletcher for the specific purpose of influencing their votes

on his application for a building height variance, thus committing the crime of bribery. See Division 2(a) below.

1(b). We decline to review the Court of Appeals' holding that the evidence against Sarper was insufficient to support the verdict of guilty. See our Rule 30(1).

The Charge

2(a). The state contends the Court of Appeals erred in holding the trial court's charge constituted reversible error. The trial court charged the jury on the definition of the offense of bribery as set forth in OCGA § 16-10-2(a)(1), which provides that:

> "[a] person commits the offense of bribery when . . . [h]e gives or offers to give to any person acting for or on behalf of the state or any political subdivision thereof . . . any benefit, reward, or consideration to which he is not entitled with the purpose of influencing him in the performance of any act related to the functions of his office."

The trial judge then stated to the jury that "the word 'entitled' does not have any specific or extraordinary or particular legal terminology or definition. I will charge you the word 'entitle' means to give a deed or title to." Regarding the Ethics in Government Act, OCGA § 21-5-1 et seq., the court charged:

> A campaign contribution means a gift, an advance or deposit of money or anything of value, conveyed or transferred for the purposes of influencing the nomination for election or election of any person for office. . . . [A] campaign contribution, as I have just defined for

> you, can be made directly to the candidate . . . [U]nder Georgia Law campaign contributions can be made for use in future campaigns for elective office . . . : [I]t is not the use to which the money may be put, but it is the purpose for which the money was paid that controls."

2(b). The Court of Appeals found the trial court's charge faulty for failing to read the bribery statute, OCGA § 16-10-2, in conjunction with the Ethics in Government Act, OCGA § 21-5-1 et seq., which defines political contributions and sets forth the manner in which they may be received and reported. In particular, the Court of Appeals held the language of the bribery statute prohibiting the giving or offering to a public officer of a benefit to which that officer *"is not entitled,"* is to be read very narrowly to proscribe the giving or offering to a public official of a benefit to which that officer *"is not qualified or privileged to receive or has no grounds or right to seek, request or receive."* 191 Ga. App. at p. 97. [Emphasis supplied]. The Court of Appeals further held

> a campaign contribution, whether made to a candidate in the heat of a campaign or to encourage or influence the official after he is elected, is something which a candidate or elected official is qualified or privileged to request or receive and thus something to which he is "entitled" within the meaning of OCGA § 1610-2.

191 Ga. App. at p. 98. We interpret this holding as meaning, in effect, that if money given to an office holder qualifies as a campaign contribution, requiring reporting under the Ethics in Government Act, OCGA § 21-5-1 et

seq., then it cannot be a bribe. With this conclusion we respectfully disagree.

The Ethics in Government Act has in no manner altered the bribery statute. The Act simply defines a campaign contribution[1] and, having defined, requires

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[1] The term "contribution" is defined in OCGA § 21-5-3(6) as follows:

> 'Contribution' means a gift, subscription, membership, loan, forgiveness of debt, advance or deposit of money or anything of value conveyed or transferred for the purpose of influencing the nomination for election or election of any person for office, bringing about the recall of a public officer holding elective office or opposing the recall of a public officer holding elective office, or the influencing of voter approval or rejection of a proposed constitutional amendment, a state-wide referendum, or a proposed question which is to appear on the ballot in any county or municipal election. The term specifically shall not include the value of personal services performed by persons who serve without compensation from any sources and on a voluntary basis. The term 'contribution' shall include other forms of payment made to candidates for office or who hold office when such fees and compensation made can be reasonably construed as a campaign contribution designed to encourage or influence a candidate or public officer holding elective office.

Although portions of the foregoing language might be read to authorize bribery of a candidate for public officer [sic], we decline to interpret the statute to reach such an absurd result. An explanation for the somewhat inartful language of the statute may be found in its legislative history. The predecessor statute to the Ethics in Government Act (the Financial Disclosure Act, Ga. L. 1974, pp. 155 et seq.) defined "contribution" as follows:

" 'Contribution' means a gift, subscription, loan, forgiveness of debt, advance or deposit of money or anything of value

disclosure. Specifically, nothing in the Act permits a public office holder to request or receive anything of value "to which he is not entitled with the purpose of influencing him in the performance of any act related to the functions of his office or employment. . . . " (OCGA § 16-10-2 (a)). Nor is the term "entitled," as contained in the bribery statute, modified in any way by the Ethics in Government Act. Other than

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conveyed or transferred for the purpose of influencing the nomination for election or election of any person for the offices provided for in section 2." Ga. L. 1974, p. 155.

The following year, the act was amended to provide:

" 'Contribution' means a gift, subscription, loan, forgiveness of debt, advance or deposit of money or anything of value conveyed or transferred for the purpose of influencing the nomination for election or election of any person for the offices provided for in section 2, but the term specifically shall not include the value of personal services performed by persons who serve without compensation from any source and on a voluntary basis. 'Contribution' shall include retained fees, fees or any other form of payment made to candidates for office or who hold office when such fees and compensation made can be reasonably construed as a campaign contribution designed to encourage or influence the candidate or office holder to introduce legislation which enriches the person, company, corporation or other entity which made the contribution. Introduction of such enriching legislation by the candidate subsequent to his election to office shall be prima facie evidence that the fee, compensation or retainer fee was a campaign contribution under the meaning of this Act." Ga. L. 1975, p. 1122-23.

The Ethics in Government Act carried forward the substance of this definition, but removed the words that restricted the term "influence" to influencing the introduction of enriching legislation. We view this not as an attempt to restrict the definition of a *bribe*, but as a manner of enlarging the definition of a *contribution* so as to insure the reporting of most all transfers to the candidate or office holder.

those emoluments of public office that are expressly authorized and established by law, no holder of public office is entitled to request or receive – from any source, directly or indirectly – anything of value in exchange for the performance of any act related to the functions of that office.[2]

As noted above, the Court of Appeals found the trial court's definition of the term "entitled" misleading because it failed to inform the jury that a public official is entitled to receive campaign contributions. Although we reverse this holding, we note the trial court's charge on the meaning of "entitled," see Division 2(a) above, was somewhat inapt. However, because the more appropriate meaning of "entitled" is more restrictive than the definition given by the trial court, we view any error as helpful to the accused, and harmless.

Constitutionality of the Bribery Statute

Vagueness Challenge

3. We find no merit to Agan's contention that OCGA § 16-10-2(a) is unconstitutionally vague, hence void. A similar contention was rejected in *King v. State*, 246 Ga. 386, 387-388 (271 SE2d 630) (1980), as follows:

> Bribery is a well-known word, used widely and understood generally. Its ordinary signification

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[2] Our holding means that a transfer that is a bribe as defined by OCGA § 16-10-2 also may come within the definition of "contribution" as contained in the third sentence of OCGA § 21-5-3 (6). The fact that such a transfer must be reported does not change its character as a bribe.

may mean an " 'act of influencing the action of another by corrupt inducement.' . . . [cit.]"

First Amendment Challenge

4. Agan contends the bribery statute must be interpreted as condemning only a payment to a public officer who agrees to a clearly delineated *quid quo pro,* [sic] i.e., an explicit purchase of an explicit official act. Were that not so, he insists, the bribery statute would be an impermissible restraint upon free speech under the First Amendment to the Constitution of the United States. He relies principally upon *Buckley v. Valeo,* 424 US 1 (96 SC 612, 46 LE2d 659) (1976).

In *Buckley,* the Supreme Court examined the application of the First Amendment to limitations upon campaign expenditures by a candidate for public office, and limitations upon amounts that might be contributed to a campaign, finding a violation of the right of free speech for the former, and none for the latter. The holdings in *Buckley* do not apply to the bribery statute, which places no limitation upon *amounts* of contributions or expenditures, but, rather, restricts the *purposes* for which any "benefit, reward or consideration" may be offered or given to, or solicited or accepted by, a public officer. Even assuming the First Amendment might relate to the purposes of political transfers, it cannot be understood to shield the bribing of a public officer.[3]

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[3] "Where the letter of the statute results in absurdity or injustice or would lead to contradictions, the meaning of general language may be restrained by the spirit or reason of the statute." *Sirmans v. Sirmans,* 222 Ga. 202, 204 (149 SE2d 101) (1966). That logic should apply alike to all legal authorities, including the Constitution.

We decline to follow the "rule," as urged by Agan, of *People v. Brandstetter,* 103 Ill. App. 3d 259 (430 NE2d 731) (1982), that:

Citizens of Georgia have every right to try to influence their public officers – through petition and protest, promises of political support and threats of political reprisal. They do not have, nor have they ever had, the "right" to buy the official act of a public officer. OCGA § 16-10-2(a). Public officers are not prohibited from receiving legitimate financial aid in support of nomination or election to public office. They do *not* have, nor have they ever had, the "right" to sell the powers of their offices.[4] OCGA § 16-10-2 (b). The bribery statute does

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"[P]ublic officials are 'authorized by law' to receive campaign contributions from those who might seek to influence the candidate's performance as long as no promise for or performance of a specific official act is given in exchange." *Id.*, at 736. In that case, a political activist was convicted of bribery for handing to a state legislator a note that read: "Mr. ___, the offer for help in your election & $1000 for your campaign for Pro ERA vote."

While Brandstetter's conviction was affirmed on appeal, we are concerned that its "rule" would proliferate corrupt practices. As example, note this story in *The Atlanta Journal and Constitution* of July 8, 1989: "A millionaire who handed out $10,000 checks on the [Texas] Senate floor while legislation that interested him was pending said the checks were political contributions, not an attempt to bribe lawmakers. 'It would be difficult to make it into a bribery case,' said [the district attorney], who believes it's time to change Texas's loose campaign finance laws. 'In Texas, it's almost impossible to bribe a public official as long as you report it. . . . ' "

[4] The acceptance of a bribe is an egregious conflict of interest, and will vitiate official acts that otherwise appear to be lawful. "When neighbors of rezoned property challenge the rezoning in court on its merits, it will be set aside only if fraud or corruption is shown or the rezoning power is being manifestly abused to the oppression of the neighbors." *Cross v. Hall County*, 238 Ga. 709, 711 (235 SE2d 379) (1977). For recent cases on conflicts of interest, see *Dunaway v. City of Marietta*, 251 Ga.

not serve to weaken free speech. It serves to strengthen free government.

The Display of Currency

5. We need not determine the propriety of the admission into evidence of currency obtained through the cashing of checks and the district attorney's display of that currency. The error, if any, was not so harmful as to require reversal under the standard of *Johnson v. State*, 238 Ga. 59, 61 (230 SE2d 869) (1976).

Selective Prosecution

6. The state contends error in the Court of Appeals' holding that the trial court applied an incorrect standard in denying Agan and Sarper an evidentiary hearing on their selective prosecution defense. The majority held the

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727 (308 SE2d 823) (1983); *Wyman v. Popham*, 252 Ga. 247 (312 SE2d 795) (1984); *Brooks v. Dept. of Transportation*, 254 Ga. 303 (4) (328 SE2d 705) (1985); and *Vickers v. Coffee County*, 255 Ga. 659 (340 SE2d 585) (1986). See also *Olley Valley Estates v. Fussell*, 232 Ga. 779, 784-785 (208 SE2d 801) (1977): "[W]here self-interested voting has been alleged, the usual rule of only limited review of zoning decisions is abrogated, and judicial inquiry into all the pertinent surrounding circumstances is proper, and this is true whether or not the question of the commissioner's possible bias was raised at the zoning hearing."

Criminal sanctions attached to bribery inhere to the prosecutorial authority of the district attorney. Civil sanctions, as exemplified by the cases cited in this note, lie to an aggrieved citizen, that is, to one who has suffered "substantial damage to a substantial interest". *Brand v. Wilson*, 252 Ga. 416, 417 (314 SE2d 192) (1985).

defendants would be entitled to a hearing on their showing of "colorable entitlement" to that defense. 191 Ga. App. at 99(5).

In support of their pre-trial motion to dismiss for selective prosecution, Agan and Sarper claimed they could not be prosecuted for paying money to county commissioners for the purpose of influencing their vote on a pending land use application because the district attorney had not prosecuted others who have made similar payments. Their offer of proof consisted of: the names of all persons who made money transfers to the two commissioners during the years 1982 through 1987; the names of all such donors who had interests in matters pending before the county commission at the times that the money transfers were made; and, derived from a comparison of those two lists, a list of money transfers that were made to the two commissioners contemporaneously with the pendency before the county commission of applications that had been filed on behalf of such donors. The number of such transfers was 252.[5]

The Court of Appeals held, contrary to the trial court's holding,[6] that the proffer was sufficient to entitle

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[5] The indications from the proffer are that, for the years 1982, 1986, and 1987, one of the two commissioners reported 221 transfers of funds from donors having matters pending before the county commission at the times of such transfers. The total thus transferred was $164,900. The other commissioner, in 1984, received from similar donors 31 transfers that totalled $11,950.

[6] The trial court's written order recited: "Merely showing that other zoning applicants have made campaign contributions would not be sufficient in the court's opinion to sustain a claim of selective prosecution. The defendants must show that other

Agan and Sarper to an evidentiary hearing.[7] We agree. We have stated the rule as to selective prosecution in the following terms:

> The party seeking to prove unconstitutionally discriminatory enforcement of the law under Yick Wo [v. Hopkins, 118 U.S. 356 (6 S.Ct. 1064, 30 LEd 220) (1886)] has the burden of presenting sufficient evidence to establish the existence of intentional or purposeful discrimination which is deliberately based upon an unjustifiable standard, such as race, religion, or other arbitrary classifications.

State v. Causey, 246 Ga. 735, 737 (273 SE2d 6) (1980).[8] The proffer here included details of money transfers that were similar to those for which Agan and Sarper were prosecuted, and identified sources of reliable and available evidence, i. e., permanent public records, and names of witnesses who are disinterested in this prosecution. Because the proffer demonstrated a reasonable likelihood that Agan and Sarper might be able to prevail in their contention of selective prosecution under the rule in

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persons are in the same or similar circumstances and have not been prosecuted. Defendants have made no showing that the state has information similar to the information on these defendants where the state failed to prosecute. For this reason, defendants' motion to dismiss for selective prosecution is denied."

This statement of legal principles is essentially correct. We disagree, however, with the trial court's assessment of the proffer.

[7] 191 Ga. App., at pp. 99-100.

[8] This standard was reiterated in *Sabel v. State*, 250 Ga. 640, 643 (300 SE2d 663) (1983) and in *Dept. of Natural Resources v. Union Timber Corp.*, 258 Ga. 873, 876 (375 SE2d 856) (1989).

Causey, they should have been given the opportunity to submit their proofs.[9] Although this issue is now moot as to Sarper, see Division 1(b) supra, Agan is entitled to a hearing on his claim of selective prosecution.

We point out, however, that a proffer strong enough to merit an evidentiary hearing does not, of necessity, equate to proof of selective prosecution. Under the rule of *Causey*, the fact that only one person is prosecuted for doing what many others do is no warrant, in itself, for relief.[10] Agan has the burden of proving by the weight of the evidence that his prosecution represents an "intentional or purposeful discrimination which is deliberately based upon an unjustifiable standard, such as race, religion, or other arbitrary classification."[11] This he must establish, if he can, by proving the averments of their proffer relative to other money transfers,[12] and by

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[9] On their face, the allegations of Agan and Sarber appear to have more substance than those which were advanced in *Sabel*, supra, and *Causey*, supra.

[10] "Some selective enforcement is not in itself a constitutional violation." *Sabel*, supra, at p. 643. The sole fact that only one actor is prosecuted cannot be "selective prosecution," as it then would be impossible to initiate the first prosecution under a new criminal statute, or to begin a "crackdown" on unlawful behavior that had gone unchecked in the past.

[11] *Causey*, supra, at p. 737.

[12] The proffer purports to be a list of contributions made to the two commissioners involved with this prosecution. It would be relevant to the issue of "arbitrary classification" to consider a compilation of all financial transfers (within reasonable time limits) that have been made to all voting commissioners during the pendency before the county commission of matters in which the donors had financial interests.

showing, through the testimony of the district attorney or otherwise, the extent of any other investigations or prosecutions of donors who are situated similarly.[13] If, notwithstanding the disclosure to the district attorney of the proffer materials, it should appear that he has conducted little or no investigation into apparently similar offenses, or has initiated no prosecutions of any such offenses, only then would it be incumbent upon the district attorney to demonstrate that the prosecution of Agan is something other than selective prosecution.

Depending upon the evidence, the trial judge as trier of fact might find that similar offenses have gone uninvestigated or unprosecuted; that the district attorney knew or should have known of such offenses; and that failure to act is without a reasonable and responsible explanation.[14] Based on such a finding, the trier of fact

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[13] Agan and Sarper sought to cross-examine the district attorney at the hearing held on their motion. The trial court refused their request, observing: "And before I am going to require the district attorney to get on the stand and let you start cross-examining him about how he makes decisions to prosecute cases, a prima facie case and reasonable cause to believe that there is some selective prosecution [must be shown]. I don't think you have shown me enough." Our comment at note 6, above, applies as well to this ruling.

[14] The passage of time may be important here. Agan and Sarper were indicted and arrested in July, 1987. The motion as to selective prosecution was filed in September, 1987. Hearing was held in November, 1987, and the court denied the motion in January, 1987 [sic]. The trial took place in that same month, and a motion for new trial was denied in February, 1988. The Court of Appeals opinion was handed down in March, 1989.

might conclude that the circumstances support an inference of the existence of "intentional or purposeful discrimination" based upon an "unjustifiable standard" of an "arbitrary classification" – that is, an arbitrary classification whereby *only* Agan continues to be prosecuted, and all the rest go free. Such a conclusion would equate to selective prosecution.

Accordingly, and notwithstanding the reinstatement of Agan's conviction for want of reversible error during the trial, the case is remanded to the trial court with direction that an evidentiary hearing be accorded to Agan on his proffer. If he should succeed in establishing that his prosecution is "selective prosecution" under the principles we have outlined, his conviction must be vacated. Failing that, his conviction will stand.

5. We have reviewed the remaining contentions on appeal and find no error.

Judgment affirmed in part, reversed in part, and remanded. All the Justices concur.

APPENDIX E

IN THE SUPERIOR COURT OF DEKALB COUNTY
STATE OF GEORGIA

STATE OF GEORGIA,	)	
	)	CRIMINAL CASE NO.
vs.	)	87-CR 3093
RAMSEY AGAN,	)	
MUSTAFA RAUF SARPER,	)	
DEFENDANTS.	)	

DEFENDANT'S REQUESTS TO CHARGE THE JURY

* * *

REQUEST NO. 2

It is not illegal or improper to make a contribution to the election or reelection campaign of an incumbent office holder.

1975 Op. Attorney General

No. 75-143

REQUEST NO. 3

There is nothing improper or illegal about contributing directly to a candidate or public official. A citizen is entitled to present his contribution directly to the candidate or public official in person.

It is not illegal or improper to make a check out directly to the candidate or public official. The fact that the checks in evidence before you are made out to Mr. Fletcher and Mr. Lanier does not make them illegal.

O. C. G. A. 21-5-33.

REQUEST NO. 4

A campaign contribution is a payment which can reasonably be construed to encourage or influence a public officer holding elected office.

O.C.G.A. 21-5-3(6)

* * *

REQUEST TO CHARGE NO. 8

If you find that the checks given by the defendants to the elected officials are campaign contributions then you must acquit the defendants.

I further charge you that if the State has no direct evidence that the checks are not campaign contributions then the circumstantial evidence must convince you beyond a reasonable doubt that they are not campaign contributions.

REQUEST TO CHARGE NO. 9

It is not illegal to make a campaign contribution to a public official for the purpose of influencing his decision on a matter pending before, or which in the future may be considered by, the public official, if it is not conditional.

APPENDIX F

IN THE SUPERIOR COURT FOR THE COUNTY
OF DEKALB, STATE OF GEORGIA
JANUARY TERM, 1988

STATE OF GEORGIA	)	INDICTMENT NO
	)	87-CR-3093
vs.	)	
	)	VOLUME IV
RAMSEY AGAN and	)	
RAUF SARPER	)	

TRANSCRIPT OF EVIDENCE

* * *

Excerpts from Charge to the Jury:

. . .

(Page 809 [1.7] through page 811 [1.9].)

As you know the defendants in this case are charged with the offense of bribery. Let me go over with you the Georgia Law, the definition which will contain the elements that must be proven by the State beyond a reasonable doubt for a conviction as to the kind of bribery. Under Georgia Law a person commits bribery when he gives or offers to give to any person acting for or on behalf of the State or any political subdivision thereof, any benefit, reward or consideration to which he is not entitled, with the purpose of influencing him in the performance of any act related to the function of his office or employment.

Now, the word "entitled" does not have any specific or extraordinary or particular legal terminology or definition. I will charge you the word "entitled" means to have a deed or title to.

I will further charge you that the DeKalb County Board of Commissioners serve DeKalb County and DeKalb County is a political subdivision of the State of Georgia.

Now, there is in Georgia Law an Act which is known as the Ethics in Government Act. This Act, among other things, discuss campaign contributions. Let me define for you, under the Ethics in Government Act, the definition of a campaign contribution. Now, for the purpose of this case, there are certain other elements of the definition which are not material. It is a rather long definition and it will be very confusing. What I have done is taken the relevant sections, the sections that I think are necessary for you to understand in your consideration of this case: A campaign contribution means a gift, an advance or deposit of money or anything of value, conveyed or transferred, for the purposes of influencing the nomination for election or election of any person for office.

I will further charge you that a campaign contribution, as I have just defined for you, can be made directly to the candidate.

Now, I will further charge you that under Georgia Law campaign contributions can be made for use in future campaigns for elective office.

In this regard, and in light of the instructions I have given you earlier, I will tell you that *it is not the use to which the money may be put, but it is the purpose for which the money was paid that controls.*

. . .

(Page 810 [1.5] through page 810 [1.22].)

Now, there is in Georgia Law an Act which is known as the Ethics in Government Act. This Act, among other things, discusses campaign contributions. Let me define for you, under the Ethics in Government Act, the definition of a campaign contribution. Now, for the purpose of this case, there are certain other elements of the definition which are not material. It is a rather long definition and it will be very confusing. What I have done is taken the relevant sections, the sections that I think are necessary for you to understand in your consideration of this case: A campaign contribution means a gift, an advance or deposit of money or anything of value, conveyed or transferred, for the purposes of influencing the nomination for election or election of any person for office.

. . .

(Page 826 [1.4] through page 826 [1.20].)

Well, let me recharge you generally on what the law is as to intent. You recall when I charged you on intent I said intent is an essential element of any crime. Intent must be proved by the State beyond a reasonable doubt. Now, intent can be shown in many ways, provided you, the jury, believe that it existed from the proven facts before you and can be inferred from proven circumstances or by acts and conduct or it may be, in your discretion, inferred when it is the natural and necessary consequence of the act.

Now, criminal intent does not mean the intent to violate the law or to violate any particular criminal statute. Criminal intent means simply to intend to commit the act which is prohibited by a statute.

. . .

(Page 828 [1.24] through page 829 [1.8].)

This is, again, an inference which the jury can make. The jury can infer in this case, if you wish to do so, that the acts of a person of sound mind and discretion are the products of his will. And you can also infer, if you wish to do so, that a person of sound mind and discretion intends the natural and probable consequences of his acts. Whether you make any inferences in this case is a matter solely within the discretion of the jury.

APPENDIX G

IN THE SUPERIOR COURT OF DEKALB COUNTY

STATE OF GEORGIA

STATE OF GEORGIA,	)	
	)	
vs.	)	CASE NO. 87CR-3093
RAMSEY AGAN and	)	
MUSTAFA	)	
RAUF SARPER,	)	
DEFENDANTS	)	

MOTION TO DISMISS FOR SELECTIVE PROSECUTION AND MOTION FOR EVIDENTIARY HEARING

(Filed Sept. 17, 1987)

Come now the Defendants Ramsey Agan and Mustafa Rauf Sarper, and request that this Court enter an order dismissing the above-referenced indictments in all counts on the basis that they are being selectively prosecuted because of their national origin. This selective prosecution violates the 14th Amendment to the United States Constitution and the Constitution of the State of Georgia.

Because of the great volume of documentary and testimentary evidence which must be presented to support defendants position on this motion defendants respectfully request that this Court grant an evidentiary hearing no sooner than 90 days from today's date so that their attorneys may complete their investigation and interviews of potential witnesses so as to provide an adequate and effective defense for the defendants.

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P. Bruce Kirwin
Attorney for Defendant
Mustafa Rauf Sarper

IN THE SUPERIOR COURT OF DEKALB COUNTY
STATE OF GEORGIA

STATE OF GEORGIA,	)	
	)	
vs.	)	CASE NO. 87CR-3093
	)	
RAMSEY AGAN and	)	
MUSTAFA	)	
RAUF SARPER,	)	
DEFENDANTS	)	

BRIEF IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS FOR SELECTIVE PROSECUTION

Come now Ramsey Agan and Mustafa Rauf Sarper defendants in the above-styled action and files [sic] this their Brief in Support of Motion to Dismiss for Selective Prosecution.

STATEMENT OF FACTS

Ramsey Agan and Mustafa Rauf Sarper have been accused in an indictment of four counts of bribery; violation of O.C.G.A. § 16-10-2. The factual basis of the indictment is a series of checks which were delivered by Agan

and Sarper to two DeKalb County Commissioners-Fletcher and Lanier. All these checks were clearly marked denominating that they were to be campaign contributions and were to be delivered to said commissioners as campaign contributions.

Agan specifically stated to both commissioners that these were contributions and were not contingent upon any specific action by the commissioners. (Affidavit of Agan).

The Campaign Financing Disclosure Reports [which are filed with the Probate Court of DeKalb County] indicate that there are other individuals who have made political contributions to these two commissioners while zoning petitions affecting their interests were pending before the DeKalb County Commission.

None of the other individuals have been indicted.

ARGUMENT AND CITATION OF AUTHORITY

DEFENDANTS INDICTMENT IS INVALID FOR THE REASON THAT IT IS A DISCRIMINATORY PROSECUTION AND VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Discriminatory prosecution or enforcement of a criminal statute has been recognized as a valid defense to a criminal charge. The Supreme Court of the United States recognizes this defense in the landmark case of *Yick Wo v. Hopkins* (1886) 18 U.S. 356. The Court stated . . .

"Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered

by public authority with an evil eye and unequal hand, so as practically to make unjust and illegal discrimination between persons in similar circumstance, material to their rights, the denial of due process is still within the prohibition of the Constitution".

As recently as 1962 in the case of *Oyler v. Boles,* 368 U.S. 448, the Court stated . . .

"The equal protection clause is violated if a criminal prosecution was deliberately based upon an unjustifiable standard such as race, religion or other arbitrary classification".

The Supreme Court is simply setting forth a statement that a law can be fair on its face but unfair in its application.

There is nothing unfair about O.C.G.A. § 16-10-2 if it is applied equally to all people similarly situated.

The Supreme Court of Georgia has recognized the defense of selective prosecution in the case of *Sabel v. State,* 250 Ga. 640 (1983), p. 643. The Court cites *Oyler v. Boles* (supra). The Georgia Supreme Court addresses the issue squarely by stating selective enforcement is not a constitutional violation, but it is a constitutional violation if the selective enforcement must represent an intentional and purposeful discrimination based upon some unjustifiable standard such as race, religion or other arbitrary classification.

The facts before this court go even further in that there is an affidavit from a former county commissioner

which shows that there is strong evidence that the Chairman of the DeKalb County Commissioner, Manual Maloof, has indicated a strong prejudice against defendant Agan because of his national origin which would be evidence of purposeful and arbitrary discrimination.

Once the defendant presents evidence of intentional and arbitrary discrimination defendants had carried the threshold issue and the State should be required to show that the selection process actually rested on some valid ground.

It is clear from even the preliminary evidence before this Court that there are a number of other people similarly situated as to the defendants who have not been prosecuted are generally never prosecuted. The statements of the present DeKalb County Commissioner Chairman indicates a strong prejudice which could evidence itself in purposeful discrimination against these Defendants.

Defendants have presented evidence which creates a strong inference of discriminatory prosecution. It is now the State's obligation to show that this prosecution rests on some valid ground if possible. See *Associated Industries of Alabama v. State,* 314 Sou. 2d 879, 55 Alabama App. 377.

CONCLUSION

The Court should dismiss the indictment against Defendants on the basis that their prosecution was based on arbitrary classification.

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